00-10666

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

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WILLIAM JOSEPH HARRIS,
Petitioner,

v.

[redacted]
UNITED STATES OF AMERICA,
Respondent.

---

MOTION TO PROCEED IN *FORMA PAUPERIS*

The Petitioner, through his undersigned counsel, requests leave to proceed in *forma pauperis* in this Court pursuant to Rule 39 of the Supreme Court Rules and 18 U.S.C. § 3006A(d)(6). Petitioner was appointed counsel by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Middle District of North Carolina pursuant to the Criminal Justice Act of 1964. No affidavit is attached inasmuch as the above-referenced courts below appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted, this 14th day of June, 2001.

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WILLIAM JOSEPH HARRIS

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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## QUESTION PRESENTED

WHETHER "BRANDISHED" AS USED IN 18 U.S.C. § 924(C)(1)(A) IS AN ELEMENT OF THE OFFENSE OR A SENTENCING FACTOR?

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---

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

---

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on March 20, 2001.

## OPINION BELOW

The opinion of the Fourth Circuit, for which review is sought, is United States v. Harris, No. 00-4154 (4th Cir. March 20, 2001). The district court's judgment sought to be reversed is United States v. Harris, No. 1:99CR191-1 (M.D.N.C., February 28, 2000). The district court judgment is reproduced in Appendix A and the Fourth Circuit's opinion is reproduced in Appendix B.

## JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on March 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



## STATUTE INVOLVED IN THE CASE

18 U.S.C. § 924(c)(1)(A)

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime --

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

## STATEMENT OF THE CASE

On August 31, 1999, Petitioner, William Joseph Harris, was named in a four-count superseding indictment by a grand jury in the United States District Court for the Middle District of North Carolina. Counts One and Three charged Harris with unlawful distribution of marijuana on separate dates in violation of 21 U.S.C. § 841(a)(1). Counts Two and Four charged Harris with carrying a firearm during and in relation to the marijuana offenses in violation of 18 U.S.C. § 924(c)(1).

On October 26, 1999, Harris entered a plea of guilty to Count One, one of the marijuana distribution offenses. The court granted the government's motion to dismiss Counts Three and Four. Harris then went to trial on Count Two, charging him with carrying a firearm during and in relation to the marijuana offense to which he pleaded guilty in Count One. Harris waived his right to a jury trial and was found guilty in a one-day bench trial on October 26, 1999. At the close of the government's case, Harris moved for acquittal pursuant to Rule 29, and the court denied that motion.

At sentencing, Harris argued that "brandished" is an element of a separate offense that the government failed to charge in the indictment and prove beyond a reasonable doubt at trial. The trial court ruled against Harris. Judgment was formally entered February 28, 2000. Harris filed a timely notice of appeal on February 18, 2000. The Fourth Circuit affirmed the Petitioner's conviction in a published opinion on March 20, 2001.



## FACTUAL BACKGROUND

Harris, was the owner and operator of Harris Pawn Shop, a federal firearm licensee, in Albemarle, North Carolina. On April 29, 1999, Special Agent Boykin, an undercover officer with ATF, accompanied Harris' half-brother, Rodney Deaton, who was acting as a confidential informant, to Harris Pawn Shop to purchase marijuana from Harris. The pawn shop was open on all three occasions Agent Boykin dealt with Harris.

During the first transaction, Agent Boykin spent about thirty minutes in conversation in the pawn shop before negotiating the marijuana transaction. As was his habit while in the pawn shop, Harris was wearing a Taurus nine-millimeter pistol on his waist. After the transaction was completed, Deaton commented on Harris' weapon, and Agent Boykin remarked on it as well. In response, Harris explained that it used special homemade ammunition that could penetrate a cop's armored jacket and go through his heart. Uncontradicted testimony established that Harris always wore the pistol for protection while at the pawn shop, but he always left it at the pawn shop when he went home at night. The court found that it is common practice for people working at pawn shops to wear pistols.

Harris had sold marijuana to only four friends and the few people his brother brought with him, such as Agent Boykin. Harris did not always sell marijuana from the pawn shop. He most often sold it from his house. However, he never had a firearm when at home. Harris' four customers also never carried firearms. Harris only sold enough marijuana to pay for the marijuana he smoked himself.

## REASONS FOR GRANTING THE WRIT

"BRANDISHED" AS USED IN 18 U.S.C. § 924(C)(1)(A) SHOULD BE INTERPRETED AS AN ELEMENT OF THE OFFENSE DUE TO THE STATUTORY CONSTRUCTION AND BECAUSE IT INCREASES THE MANDATORY MINIMUM PUNISHMENT.

In this case, the Fourth Circuit has joined the Eighth and Eleventh Circuits in finding that "brandished" and/or "discharged" are sentencing factors rather than elements of 18 U.S.C. § 924(c)(1)(A). See United States v. Carlson, 217 F.3d 986, 989 (8th Cir. 2000), cert. denied, 121 S. Ct. 822 (2001) ("[W]e conclude § 924(c)(1)(A) defines a single criminal offense for using or carrying a firearm during a violent crime, with sentencing implications if the firearm is brandished.") and United States v. Pounds, 230 F.3d 1317, 1319 (11th Cir. 2000), cert. denied, 121 S. Ct. 1631 (2001) ("We believe that the language and structure of § 924(c)(1)(A) demonstrate that Congress intended the fact of the discharge of a firearm during a crime of violence to be a sentencing factor and not an element of the § 924(c)(1)(A) offense.").

In light of the Court's recent decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), Petitioner contends that the above cases were wrongly decided, and the "brandished" clause of 18 U.S.C. § 924(c)(1)(A) is not merely a sentencing enhancement, but is an element of a separate offense that the government was required to charge in the indictment and prove beyond a reasonable doubt at trial. In Apprendi, the Court held that any statutory fact, other than a fact of prior conviction, that increases a statutory maximum sentence is an element to be pleaded and proved, not merely a sentencing enhancement. 530 U.S. at 490, 120 S. Ct. at 2362-63.



In Jones, the Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. 526 U.S. at 252, 119 S. Ct. at 1228, 143 L. Ed. 2d 311. Their applications to this case follow.

A. Rules of statutory construction mandate that § 924(c)(1)(A)(i), "brandished," and § 924(c)(1)(A)(ii), "discharged," be read consistently.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme." Food and Drug Administration v. Brown & Williamson Tobacco Corporation, 529 U.S. 120, 133 120 S. Ct. 1291, 1301 (2000) (internal citations and quotation marks omitted). Applying this canon of statutory construction to 18 U.S.C. § 924(c) requires that subsection (1)(A)(ii), "if the firearm is brandished," and subsection (1)(A)(iii), "if the firearm is discharged," be read consistently. Therefore, either "brandished" and "discharged" are both elements of the offense or they are both sentencing factors. However, one cannot be a sentencing factor and the other an element. Accordingly, the following analysis will examine both the "brandished" subsection and the "discharged" subsection in arguing that they are elements of 18 U.S.C. § 924(c)(1)(A).

B. A sentencing factor that increases the mandatory minimum should be treated like an element.

A fact that increases the mandatory minimum punishment increases the prescribed range of penalties to which a criminal defendant is exposed, and thus, should be found to be an element of

the offense under Apprendi. Justices Stevens and Thomas indicated in Jones and Apprendi, respectively, that they believed the holding in Apprendi should be extended to statutory minimums. In addition, the Sixth Circuit recently held that Apprendi applies to statutory minimums.

1. The Court should resolve the split among the circuit courts of appeal.

The Sixth Circuit recently held that where a judge found a defendant possessed 5.2 kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1), which subjected the defendant to a mandatory minimum of life in prison, the jury should have been able to determine the weight of the drugs beyond a reasonable doubt. United States v. Flowal, 234 F.3d 932, 936 (6th Cir. 2001). The Sixth Circuit expanded on Flowal in United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001). In Ramirez, the court explained that the "rights in Apprendi are triggered by the drug statute's progression of increased mandatory minimum penalties based in part on the quantity of drugs possessed." Id. at 351. Thus, the court held that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." Id.

In the instant case, the Fourth Circuit joins the First, Fifth, Seventh, and Eighth Circuits, which have found to the contrary. See United States v. Robinson, 241 F.3d 115, 122 (1st Cir. 2001)("McMillan clearly allows a fact that triggers a mandatory minimum sentence to be found by a judge using a preponderance-of-the-evidence standard as long as the mandatory minimum does not exceed the otherwise-applicable statutory



maximum. . . ."); United States v. Harris, 243 F.3d 806, 809 (4th Cir. 2001) (declining to extend Apprendi holding to statutory minimums); United States v. Keith, 230 F.3d 784, 787 (5th Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1163 (2001)("[W]e hold that a fact used in sentencing that does not increase a penalty beyond the statutory maximum need not be alleged in the indictment and proved to a jury beyond a reasonable doubt."); United States v. Smith, 223 F.3d 554, 565-66 (7th Cir. 2000), petition for cert. filed, (Jan. 16, 2001) (No. 00-8082) (increase in statutory minimums authorized by 21 U.S.C. § 848 are not increased punishment triggered by Apprendi); and United States v. Aguayo-Delgado, 220 F.3d 926, 934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) ("Those [statutory] minimums, because they are within the statutory range authorized by § 841(b)(1)(C) without reference to drug quantity, are permissible under Apprendi and McMillan even where the drug quantity was not charged in the indictment or found by the jury. . . ."). In the interest of judicial consistency, the Court should resolve this split in circuit law.

2. Justices Stevens and Thomas asserted arguments that the Apprendi holding should extend to statutory minimums.

In Apprendi, the Court held that any statutory fact, other than a prior criminal offense, that increases a statutory maximum sentence is an element to be pleaded and proved, not merely a sentencing enhancement. 530 U.S. at 490, 120 S. Ct. at 2362-63. The Court further stated that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id. (quoting from Jones, 526 U.S. 252-53, 119 S. Ct. 1228-29, 143 L. Ed. 2d 311)

(emphasis added). Justice Stevens, in his concurring opinion in Jones, stated that "a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence. . . ." 526 U.S. at 253, 119 S. Ct. at 1229, 143 L. Ed. 2d 311 (Stevens, J., concurring).

Likewise, Justice Thomas stated in Apprendi that "if a fact is by law the basis for imposing or increasing the punishment--for establishing or increasing the prosecution's entitlement-- it is an element." 530 U.S. at 521, 120 S. Ct. at 2379 (Thomas, J., concurring). He also stated that this "common-law rule would cover the McMillan situation of a mandatory minimum sentence." Id. As explained by Justice Thomas:

> No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. . . . But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum entitles the government to more than it would otherwise be entitled. . . . Thus, the fact triggering the mandatory minimum is part of the punishment sought to be inflicted, it undoubtedly enters into the punishment so as to aggravate it, and is an act to which the law affixes punishment.

530 U.S. at 521-22, 120 S. Ct. at 2379 (internal citations and quotation marks omitted). Thus, the Court should take this opportunity to overrule McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986).

3. Application of the rationale underlying Apprendi leads to the conclusion that any fact that increases the statutory minimum is an element of the offense.

When a maximum sentence increases, it only increases the possible maximum sentence. However, a certain, substantial increase in a mandatory minimum sentence is a more compelling situation for finding the facts supporting the increased mandatory



minimums to be an element to be proved, than is the situation where a maximum sentence is increased, as in Apprendi and Jones. Likewise, under § 924(c), the increase in the mandatory minimum sentence for brandishing or discharging a firearm is not merely possible, but is certain. If a defendant is found to have brandished a firearm, the mandatory minimum sentence increases from five years to seven years. If a defendant is found to have discharged a firearm, the mandatory minimum sentence increases from five years to ten years.

Furthermore, it is unlikely that any defendant would ever get a sentence approaching life for a violation of § 924(c). The guideline sentence for 18 U.S.C. § 924(c) is " . . . the minimum term of imprisonment required by statute," or, in other words, the mandatory minimum. United States Sentencing Commission, Guidelines Manual, § 2K2.4(a)(2) (Nov. 1998). In addition, before a judge could depart upward from the mandatory minimum, the judge must articulate a legally permissible basis for any such upward departure. Since it is unlikely that there would be such an upward departure in most cases under § 924(c), much less a departure to anything close to the maximim sentence of life in prison, the real, certain increase in the mandatory minimum sentences is the truly meaningful increase in a sentence under that statute. Therefore, these increases in the mandatory minimum sentences under § 924(c) present an even more compelling situation to find the facts generating those mandatory minimums as an element and not a sentencing enhancement.

C. Application of the Jones statutory analysis to 18 U.S.C. § 924(c) leads to the conclusion that "brandished" and "discharged" are elements of the offense.

In Jones, the Court held that the provisions of the federal carjacking statute, 18 U.S.C. § 2119, establishing significantly higher penalties when "serious bodily injury" or "death" results, created separate offense elements requiring proof beyond a reasonable doubt. 526 U.S. at 252, 119 S. Ct. at 1228, 143 L. Ed. 2d 311. The Jones analysis applies in this case for several reasons. First, the construction of 18 U.S.C. § 924(c) is nearly identical to the construction of the carjacking statute at issue in Jones. Thus, the analysis is equally applicable. Next, both statutes call for steeply higher penalties when a further fact occurs, i.e., a weapon is brandished or discharged. Also, the Court found it important that "serious bodily injury" is treated as an offense element in other contexts. Likewise, "brandishing" and "discharging" a weapon are crimes in and of themselves in many jurisdictions and elements of well over 200 criminal statutes, including some federal statutes. Finally, like the carjacking statute at issue in Jones, the Court may determine that there is still a possibility that "brandished" and "discharge" as used in 18 U.S.C. § 924(c) were intended to be sentencing factors. If so, the canon of constitutional avoidance should resolve the issue in favor of finding that "brandished" and "discharged" were intended to be elements of 18 U.S.C. § 924(c).

1. The Jones carjacking statute and § 924(c) are structurally identical.

First, the pertinent portions of 18 U.S.C. § 924(c) and 18 U.S.C. § 2119, the statute at issue in Jones, are virtually mirror images of each other. See App. C. Each statute contains a general clause stating the conduct prohibited in an incomplete



sentence, and then a subsection of that clause provides the penalty provision. Next, each statute contains subsections providing for increased penalties under certain conditions, i.e., in the Jones carjacking statute for "serious bodily injury" or "death" and in 18 U.S.C. § 924(c) for "brandishing" or "discharging" a firearm. Because the structure of these two sections is strikingly similar, if not virtually identical, the Jones analysis by the Court of the carjacking statute is appropriately applied to 18 U.S.C. § 924(c).

In Jones, the Court noted that the "serious bodily injury" provision of the carjacking statute was contained in a separate subsection from the first section of the statute, in which the primary elements of the crime were listed, and therefore the statute "had a look" that suggested that serious bodily injury was merely a sentencing factor. 526 U.S. at 232-33, 119 S. Ct. at 1219. However, the Court concluded that this appearance was deceptive for several reasons.

2. Both the Jones carjacking statute and § 924(c) are dependant clauses that call for steeply higher penalties.

First, the serious bodily injury section of the statute at issue in Jones established "steeply higher penalties" than cases not involving serious bodily injury. 526 U.S. at 233, 119 S. Ct. at 1219. Moreover, the Jones Court noted that the "steeply higher" penalty range was conditioned on a further fact, i.e., whether serious bodily injury occurred - a fact that was just as important as the primary elements of the crime. Id. Finally, the Court noted that the serious bodily injury subsection was not really a separate section because the first clause of the statute was an incomplete sentence without the subsection. 526 U.S. at 233-34, 119 S. Ct. at 1219.

That precise analysis applies to 18 U.S.C. § 924(c). First, like Jones, the "brandished" and "discharged" subsections are not independent sections because the first clause of the statute is an incomplete sentence without the following clauses. Second, also like Jones, the further facts provided in the subsections impose a higher penalty range that makes those facts just as important as the primary elements of the crime. If a defendant is found to have brandished a firearm, the mandatory minimum sentence increases from five years to seven years, a forty percent increase. If a defendant is found to have discharged a firearm, the mandatory minimum sentence increases from five years to ten years, a one hundred percent increase. Allowing a "sentencing factor" to double the term of imprisonment would permit the sentencing factor to be the "tail which wags the dog of the substantive offense," a result discouraged by the McMillan court. See 477 U.S. at 88, 106 S. Ct. at 2417.

3. "Brandishing" a weapon or "discharging" a weapon are crimes in many jurisdictions and elements of crimes in most jurisdictions.

Next, because the text alone did not justify any confident inference as to whether the serious bodily injury language was a sentencing enhancement or an element of the offense, the Jones Court considered whether other federal statutes included "serious bodily injury" as an offense element. The Court concluded that Congress has frequently, although not always, treated "serious bodily injury" as an offense element in other contexts. 526 U.S. at 235-36, 119 S. Ct. at 1220-21. The Court also noted that serious bodily injury was often an offense element in analogous state statutes as well. 526 U.S. at 236-37, 119 S. Ct. at 1221. Finally, the Court recognized that it would be an "oddity" to find



a term to be a statutory crime with its own offense elements in one instance, and merely a sentencing consideration in another instance. 526 U.S. at 238, 119 S. Ct. at 1222. Likewise, the Apprendi Court recognized that "the fact that New Jersey, along with numerous other States, has also made precisely the same conduct the subject of an independent substantive offense makes it clear that the mere presence of this 'enhancement' in a sentencing statute does not define its character." 530 U.S. at 496, 120 S. Ct. at 2366.

Like the provisions at issue in Jones and Apprendi, "brandishing" or "discharging" a firearm or weapon are crimes and elements of crimes in both federal and state criminal statutes. Petitioner has identified four federal criminal statutes where "discharging" a firearm is an element of the offense. See App. D. However, no federal statutes were identified where "discharging" a firearm was merely a sentencing factor. In addition, "discharging" a firearm or weapon is an element of a criminal statute in almost every state and United States territory. Many United States jurisdictions have multiple statutes making the discharge of a firearm or dangerous weapon an element of the offense. In all, Petitioner identified 210 state and United States territory statutes that made discharging a firearm or weapon either a crime or an element of a crime. See App. E. Finally, Petitioner has identified eleven United States jurisdictions in which "brandishing" a firearm or a weapon is either a statutory crime in and of itself or the element of a criminal statute. See App. F. Because "brandishing" and "discharging" firearms and weapons are either crimes with their own elements or elements of a crime in almost every United States jurisdiction, judicial consistency calls

for the terms to be treated as offense elements, not merely sentencing considerations.[1]

4. The canon of constitutional avoidance resolves the conflict in favor of finding "brandished" and "discharged" are elements.

Finally, in Jones, the Court asserted that, because its analysis under the above steps left open the possibility that "serious bodily injury" was a sentencing factor, the statute nevertheless should be construed as requiring that "serious bodily injury" be charged as an offense element under the canon of constitutional avoidance. 526 U.S. 239-52, 119 S. Ct. at 1222-28. The Court concluded that treating any fact, other than a prior conviction, that increases the maximum penalty for a crime as a sentencing factor, rather than as an element of the offense, would raise concerns involving both Fifth Amendment due process and the Sixth Amendment right to a jury. 526 U.S. 243 n.6, 119 S. Ct. at 1224 n.6. Like the carjacking statute in Jones, sections 924(c)(1)(A)(i) and (ii) should be construed as elements of 18 U.S.C. § 924(c).

D. McMillan v. Pennsylvania did not hold that "brandishing" a weapon is always a sentencing factor.

In McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), the Court examined a provision in a Pennsylvania statute imposing a mandatory minimum sentence of five years if a defendant, who had been convicted of certain enumerated felonies, "visibly possessed a firearm during the commission of the offense." 477 U.S. at 81, 106 S. Ct. at 2413, citing 42 Pa. Const. Stat. § 9712(b) (See App. G). The Court concluded that the

[1]Petitioner has not identified any legislative history that directly speaks to the issue of whether "brandishing" was intended to be a sentencing factor or an offense element. Notably, the Court did not rely heavily on legislative history in Jones either.



provision was a sentencing enhancement, not an element of any offense. 477 U.S. at 91, 106 S. Ct. at 2419. Although McMillan initially appears to be factually similar to the instant case, upon closer inspection, the instant case is easily distinguished from McMillan.

The McMillan holding is not a precedential bar to this Court ruling that "brandished" under § 924(c) is an element of the offense, for the following reasons: First, the Court specifically stated that it was not laying down any "bright line" test regarding whether "visible possession of a firearm" is a sentencing condition or element of the offense. Second, the Pennsylvania statute specifically provided that the "visibly possessed a firearm" provision was not an element of the underlying offense. In this case, § 924(c) has no such express provision providing that "brandished" is not an element. Finally, McMillan rested on the premise "that preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and the Court hesitated "to intrude upon the administration of justice by the individual States." 477 U.S. at 85, 106 S. Ct. at 2415-16. However, unlike McMillan, the statute at issue here is a federal statute, not a state statute.

1. McMillan did not establish a "bright line" rule.

The McMillan Court did not hold that "visible possession of a firearm" would always be considered a sentencing enhancement under any possible criminal statute. To the contrary, the Court specifically stated that it was not laying down any "bright line" test, and concluded that "States may treat 'visible possession of a firearm' as a sentencing consideration rather than an element of

a particular offense. . . ." 477 U.S. at 91, 106 S. Ct. at 2419 (emphasis added).

2. Unlike § 924(c), the statute at issue in McMillan did not create a new offense, but rather, the statute specifically stated that it was creating sentencing factors for a list of already existing crimes.

In Castillo v. United States, 530 U.S. 120, 125, 120 S. Ct. 2090, 2093, 147 L. Ed. 2d 94 (2000), the Court analyzed a previous version of § 924(c). Noting that the title of the entire statute was "Penalties," the Court concluded that "the section's title cannot help [interpret the statute], for Congress already has determined that at least some portion of § 924, including § 924(c) itself, creates, not penalty enhancements but entirely new crimes. . . . The title alone does not tell us which are which." Id. (internal citations omitted) (emphasis added). The revised statute at issue here is still entitled "Penalties." However, the title provides no more guidance now than it did in the original version.

Unlike § 924(c), no new criminal offense was created in the Pennsylvania statute at issue in McMillan. Rather, the Pennsylvania legislature "expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, § 9712(b), but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those [preexisting enumerated] crimes beyond a reasonable doubt." 477 U.S. at 85-86, 106 S. Ct. at 2416.

In this case, § 924(c) has no such express provision providing that "brandished" is not an element. Also, as noted above, the Court recognized in Castillo that § 924(c) does create entirely new crimes. These two distinctions make a great portion of the analysis in McMillan inapplicable to the instant case.



3. The McMillan case involved a state statute and this case involves a federal statute.

Finally, the Court stated that the McMillan case was controlled by Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). McMillan, 477 U.S. at 85, 106 S. Ct. at 2416. The Court also stated that Patterson rests on the premise "that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." 477 U.S. at 85, 106 S. Ct. at 2415-16. However, unlike McMillan, the statute at issue here is a federal statute, not a state statute. Thus, the issue of a federal entity intruding upon the administration of justice by the states is not a concern in this case.

4. The Jones analysis is more applicable to this case than the McMillan analysis.

Due to the differences between the state statute at issue in McMillan and the federal statute at issue in this case, the Jones analysis is much more applicable to this case than the McMillan analysis. As argued above, under the Jones analysis, the statutory fact of "brandished" under 18 U.S.C. § 924(c) is an element of a separate offense, and not a sentencing enhancement, because § 924(c) and the car hijacking statute in Jones are structurally identical and also because the analysis in Jones is applicable to § 924(c). So, if the car hijacking statute at issue in Jones substituted "visible possession of a firearm" for "serious bodily injury," the Court would have held that "visible possession of a firearm" under that statute was an element of an additional offense. Therefore, although "visibly possessing a firearm" was

held to be a sentencing enhancement under the statute at issue in McMillan, "visibly possessing a firearm," or the similar physical act of "brandishing a firearm," will not always be considered only a sentencing enhancement under every possible statutory scheme.

E. The error of treating an element as a sentencing factor was not harmless.

"An indictment must set forth every element of the crime that it charges." Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 1223 (1998). The indictment in this case did not allege the element of "brandished." The failure of an indictment to allege an essential element is not subject to harmless error analysis because it is a "structural defect in the trial mechanism." United States v. Floresca, 38 F.3d 706, 711-714 (4th Cir. 1994). Because the indictment in this case alleges only the offense elements contained in 18 U.S.C. § 924(c)(1)(A), and did not allege the "brandished" element contained in 18 U.S.C. § 924(c)(1)(A)(ii), Petitioner's sentence should be vacated, and the case remanded for resentencing.



## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 14th day of June, 2001.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2000

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WILLIAM JOSEPH HARRIS
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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ENTRY OF APPEARANCE AND CERTIFICATE OF SERVICE

I, William C. Ingram, having been admitted to practice before the state and federal courts situated in North Carolina and before this Court, and having been appointed to represent the Petitioner, WILLIAM JOSEPH HARRIS, in the United States Court of Appeals for the Fourth Circuit, pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, hereby enter my appearance in this Court with respect to this Petition for Writ of Certiorari.

I further certify that today, June 14, 2001, as counsel for Petitioner, I have served one copy of the Petition for Writ of Certiorari (complete with Appendix), and Petitioner's Request to Proceed in *Forma Pauperis* in the above-entitled case upon the Solicitor General for the United States Department of Justice, Tenth Street and Constitution Avenue, Washington, D.C., 20530, and all others required to be served.

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